

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

v.

D-101-CR-2023-00040

HANNAH GUTIERREZ-REED,

Defendant.

**MOTION TO SEVER CHARGES AND EXCLUDE MENTION OF ALLEGED OTHER
BAD ACTS**

Defendant Hannah Gutierrez-Reed, by and through her counsel of record, Jason Bowles of Bowles Law Firm, and Todd J. Bullion of Bullion Law Office, respectfully moves this Court to sever the tampering count from the involuntary manslaughter charge, and to exclude any mention of supposed drug possession, drug use, or intoxication. In support the following is offered:

INTRODUCTION

The various prosecutors who have been assigned to this case singled out Hannah Gutierrez Reed – a 25 year old armorer - from the beginning and have sought ever since to make her the scapegoat and someone to blame for the tragic accident that resulted in the passing of Halyna Hutchins. In the process of trying to foist the entire blame for this accident on Ms. Gutierrez Reed, prosecutors have engaged in character assassination in the media, through rumors, inappropriate and improper comments on her guilt and numerous misstatements of fact and have charged a new offense in the instant case that has no relationship to the Rust production, in an effort to cause unfair prejudice to Ms. Gutierrez Reed during trial.

The state's only witness on this tampering charge is a lay witness with no formal training in drug recognition or narcotics investigations. The supposed substance was never tested. The prosecution is inviting the jury to speculate about Ms. Gutierrez Reed possessing a substance the government says is narcotics.¹ The prosecution will ask the jury to speculate atop the prior speculation that Ms. Gutierrez Reed was impaired while working on the Rust movie set. The government's sole witness to the tampering count has no evidence of Ms. Gutierrez Reed using the substance, on or off set. Ms. Gutierrez Reed interacted with several law enforcement officers – none of them noted in reports or pre-trial interviews that Ms. Gutierrez Reed appeared to be under the influence. Law enforcement officers are trained to notice whether persons they are interacting with are impaired. A reasonably competent law enforcement officer would note suspected impairment of a witness or suspect in report. The absence of any concern about this from law enforcement is telling. Furthermore, Ms. Gutierrez Reed is on multiple videos on the date of incident and her demeanor and appearance in these videos do not suggest or imply that she is under the influence of any controlled substance. Additionally, numerous witnesses in this case were directly asked during their pre-trial interviews if they had any reason to believe Ms. Gutierrez Reed was under the influence of drugs at work or using drugs at work. All of the witnesses in their pre-trial interviews stated they had no knowledge or suspicion that Ms. Gutierrez Reed was using drugs or impaired by drugs. This charge is speculative and is designed to prejudice Ms. Gutierrez Reed and smear her character to the jury in violation of NMRA 11-404 and 11-403. The tampering charge is also not properly joined pursuant to NMRA 5-203(A) and must be severed for that reason independent of the prejudice and 11-404 and 11-403 violations.

¹ The witness, Ms. Smith, was interviewed January 12. The parties have diligently worked to set over 30 interviews in this case and had to work around the witness's schedule as well. This motion is filed as soon after this interview as counsel were able to do so.

BACKGROUND

This prosecution arises out of a tragic accident that took place on October 21, 2021, on a movie set near Santa Fe for the filming of the western movie, *Rust*. Halyna Hutchins was killed and Director Joel Sousa was wounded, when a live round was discharged during a rehearsal for a scene for *Rust*. Within a short time after the shooting, Santa Fe Sheriff’s Office deputies converged on the movie set and began an investigation.

On October 26, 2021—five days after the accident—District Attorney Carmack-Altwies started giving media interviews regarding the investigation and details about the evidence. Rather than limiting such statements to those that serve a legitimate law enforcement purpose and that were necessary to inform the public of the nature and extent of the prosecutor’s action, the District Attorney revealed that, for example, there “were an enormous amount of bullets on this set,” and she previewed that criminal charges would be filed, albeit “probably weeks, if not months” later.² Despite the fact that the District Attorney has never determined the source of the live bullets and didn’t complete her investigation for over a year, in later media statements it was disclosed that a decision was made to charge Reed criminally “pretty close to the beginning” of the investigation.³ Throughout the fall of 2021 and first half of 2022, the District Attorney’s Office repeatedly gave nationally televised interviews and issued statements to the press that improperly commented on important—and contested—factual conclusions.⁴

² Simon Romero, Graham Bowley, & Julia Jacobs, *Criminal Charges Possible in Shooting on Alec Baldwin Set*, *D.A. Says*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/movies/criminal-charges-shooting-alec-baldwin.html?smid=tw-nytimes&smtyp=cur>.

³ Alexander, Harriet, *New Mexico prosecutors say they knew ‘pretty close to the beginning’ that they would charge Alec Baldwin and armorer for fatal Rust shooting – and are confident of CONVICTIONS*, DailyMail.com (Jan. 19, 2023), <https://www.dailymail.co.uk/news/article-11656215/New-Mexico-prosecutors-knew-pretty-close-beginning-file-charges-Rust-death.html>.

⁴ See, e.g., Ted Johnson, *Santa Fe D.A. Refutes Claims of Sabotage on ‘Rust’ Set*, DEADLINE (Nov. 10, 2021), <https://deadline.com/2021/11/alec-baldwin-shooting-rust-set-santa-fe-district-attorney-sabotage-1234871332/> (Good Morning America); *Santa Fe DA Speaks About Fatal Shooting on Set of ‘Rust’*, NBC NEWS (Oct. 28, 2021), <https://kobi5.com/news/santa-fe-da-speaks-on-alec-baldwin-fatal-shooting-171821/> (NBC News). Notably, though

On January 18, 2023, the District Attorney’s Office announced that it would reveal its charging decisions related to the *Rust* shooting the following day.⁵ Featuring headshots of Carmack-Altwies and then special prosecutor Andi Reeb, the District Attorney’s Office promised⁶ that there would “be no news conference or public appearances by [the D.A.’s] office” in connection with the decision. The District Attorney and Reeb issued a press release on January 19, 2023, and announced that they planned to charge Ms. Gutierrez Reed with two counts of involuntary manslaughter, plus a sentencing enhancement for the use of a firearm. The press release stated that “[t]he firearm enhancement makes the crime punishable by a mandatory five years in jail.”⁷

Contrary to the “solemn occasion” without media appearances promised by Carmack-Altwies and Reeb, both the District Attorney and the Special Prosecutor then appeared on several national television programs to comment on the evidence, their legal theories of Ms. Gutierrez Reed’s culpability, the impending charges, and her possible sentence. Less than an hour after a decision to charge Ms. Gutierrez Reed was announced by press release on January 19, 2023, Carmack-Altwies appeared on CNN and discussed “key pieces of evidence” with a reporter from the *Santa Fe New Mexican*.⁸ The State made numerous statements on national television that did not serve a legitimate law enforcement purpose. Later on January 19, 2023, Carmack-Altwies and

the prosecution would later call it a red herring, Carmack-Altwies stated early on that finding out how a live round got on the set was one of the most important elements of the charging decision-making process, calling it the “lynchpin of the entire case.” To date, the origin of the live rounds remains unknown.

⁵ Julia Jacobs, *Prosecutors To Announce Whether They Plan Charges in ‘Rust’ Case*, N.Y. TIMES (Jan 18, 2023), <https://www.nytimes.com/2023/01/18/arts/rust-charging-decision.html>.

⁶ First Judicial District Attorney, FACEBOOK (Jan. 18, 2023, 3:32 PM), <https://www.facebook.com/1stJDA/>.

⁷ *News Release from DA Mary Carmack-Altwies on Charges Against Alec Baldwin, Hannah Gutierrez-Reed*, SANTA FE NEW MEXICAN (Jan. 19, 2023), https://www.santafenewmexican.com/news-release-from-da-mary-carmack-altwies-on-charges-against-alec-baldwin-hannah-gutierrez-reed/article_f843a8fc-9814-11ed-9526-032214a2e9cb.html. The firearm enhancement was later withdrawn with the State admitting it had made an elementary constitutional error of charging an “ex post facto” offense.

⁸ Interview by Josh Campbell, CNN Security Correspondent, with Mary Carmack-Altwies (Jan. 19, 2023, 9:42 AM m.s.t.), available at <https://transcripts.cnn.com/show/ath/date/2023-01-19/segment/02>.

Reeb appeared on Jeanine Pirro’s program on Fox News to continue making such extraordinary statements.⁹

In yet another interview with NBC News on January 19, 2023, Reeb continued to make unnecessary statements for the purpose of tainting the prosecution.¹⁰ The same day, Bryan Carpenter, who has been identified by the State as a purported expert witness, appeared on the Fox News program *Hannity* and vouched for the prosecution team as “unbiased” and as having done an “excellent job.”¹¹

As background, Carpenter appears to reside in Mississippi and has credited and uncredited experiences as a key armorer, assistant armorer, and armorer on 11 television shows, mini-series, and films. He was an early commenter in national media interviews about the accident, first appearing in the *Hollywood Reporter* on October 23, 2021.¹² On June 30, 2022, he stated an incorrect view of the legal standard for criminal liability, which made it into the byline of the *Hollywood Reporter*: “It’s strictly liability.”¹³ On January 19, 2023, Carpenter—now representing himself as a member of the prosecution team—continued to make inaccurate statements of the law and facts.

On March 30, 2023, following motions practice on the application of the special prosecutor statute, the State informed the Court that Kari Morrissey (and Jason Lewis) would enter and

⁹ Interview by Jeanine Pirro with Mary Carmack-Altwies, District Attorney, and Andrea Reeb, Special Prosecutor (Jan. 19, 2023), available at <https://twitter.com/JudgeJeanine/status/1616239686262947841>.

¹⁰ Prosecutors say the new early in the probe that the fatal “Rust” shooting would lead to charges (Jan. 19, 2023) Almaguer, Dasrath & Li, available at <https://www.nbcnews.com/news/us-news/prosecutors-say-knew-early-probe-fatal-rust-shooting-lead-charges-rcna66575>

¹¹ Interview by Sean Hannity with Bryan Carpenter, State witness and weapons master (Jan. 19, 2023), available at <https://www.foxnews.com/video/6318941869112>.

¹² See Baum, Gary, and Gardner, Chris, “Guns, Ammo, Accountability: Hollywood Munitions Experts Grapple with ‘Rust’ Tragedy,” *Hollywood Reporter* (Oct. 23, 2021), available at <https://www.hollywoodreporter.com/movies/movie-news/alec-baldwin-shooting-rust-movie-munitions-experts-gun-safety-1235035713/>.

¹³ Baum, Gary, and Giardina, Carolyn, “‘Rust’ Rallied Hollywood, But Has Spurred Limited Action So Far,” *Hollywood Reporter* (June 30, 2022), available at <https://www.hollywoodreporter.com/movies/movie-features/after-rust-gun-changes-limited-1235174055/>.

substitute as counsel for the State in the Rust prosecution. The new special prosecutors have continued to make reckless statements in the media that could only be designed to poison potential jurors against Ms. Gutierrez Reed. For example, in June 2023, special prosecutors wrote in a filing that witnesses had come forward to say that Ms. Gutierrez Reed was drinking heavily during production of Rust and speculated that she was “hungover” the day that a live round ended up in Baldwin’s gun. This was reported in the media.¹⁴ Yet, no witnesses have been produced to say that Ms. Gutierrez Reed was drinking heavily and likely hungover on set. The opposite is true. Interview of props assistant, Nicole Montoya, who was on set and around Ms. Gutierrez Reed on the day of the fatal shooting, revealed that she did not seem intoxicated or hungover. Nor did Sarah Zachary, head of props, say anything like that. Baldwin and Halls both believed Ms. Gutierrez Reed performed her job competently. The media has run statements containing the special prosecutors’ speculative and prejudicial arguments verbatim and has received extensive coverage in our Country’s most prominent media outlets:

“In a motion filed Thursday, the prosecutors say they have a confidential witness will testify that Gutierrez-Reed handed off the drugs after returning from her initial police interview.

“The circumstances of the transfer of evidence strongly support the charge that the defendant transferred the cocaine to avoid prosecution and prevent law enforcement from obtaining highly inculpatory evidence directly related the defendant’s handling of the firearm and the circumstances of the fatal shooting of Halyna Hutchins,” the prosecutors wrote.”

‘Rust’ prosecutors say film’s armorer handed off bag of cocaine after shooting. By Variety. June 30, 2023 available at <https://www.nbcnews.com/news/us-news/rust-prosecutors-say-films-armorer-handed-bag-cocaine-shooting-rcna91981>.

¹⁴ Hannah Gutierrez Reed Slams Rumors She Was ‘Hungover’ on ‘Rust’ Set: Kristin Myers, y!Entertainment, June 16, 2023.

This speculation on the part of the prosecutor has undoubtedly been seen by almost every person in America and most of if not all of the jury pool in this case.¹⁵ Statements have been made by the special prosecutor that Ms. Gutierrez Reed has a substance abuse problem during court proceedings -- those statements have also been publicized in prominent media outlets.¹⁶

In addition, special prosecutors tried character assassination by claiming that Ms. Gutierrez Reed handed the keys, years before Rust, to an intoxicated individual who then died in a motorcycle crash.¹⁷ Again, this assertion was recklessly false. The individual who died, was Ms. Gutierrez Reed's then boyfriend whom she tried to stop from driving his motorcycle. The bike was a kick start and didn't require a key to start it. For the prosecution team as a whole, however, the facts have mattered less than making sure Ms. Gutierrez Reed's character has been utterly destroyed in the media and that she is made to seem generally reckless, to support their narrative. This tampering charge is the latest step in furtherance of the concerted effort to assassinate Ms. Gutierrez Reed's character and deny her a fair trial.

On August 1, 2023 held a hearing on Ms. Gutierrez Reed's motion to dismiss all charges, which was in part based on extrajudicial statements by prosecutors. The motion raised the issue of

¹⁵ Prosecutors Allege 'Rust' Armorer Was Hungover, Resulting in Live Rounds Being Loaded in Gun. People Magazine. Tommy McArdle. Published June 14, 2023 available at <https://people.com/prosecutors-allege-rust-armorer-was-hungover-resulting-in-live-rounds-in-loaded-gun-7546788>; see also 'Rust' armorer likely was hungover when she loaded the gun used in the fatal movie set shooting, prosecutors say. CNN. Tina Burnside and LJ Spact. Published June 14, 2023 available at <https://www.cnn.com/2023/06/14/entertainment/rust-shooting-armorer-indictment-response/index.html>; see also The weapons expert in the Alec Baldwin case was hungover on set, prosecutors say. Associated Press. Susan Montoya Bryan. Published June 13, 2023. Available at <https://apnews.com/article/baldwin-rust-set-shooting-gutierrez-reed-04fe1fced4e219b53fc26bbc5cd8931>

¹⁶ 'Rust' Prosecutors turn focus on movie armorer Hannah Gutierrez Reed in shooting. LA Times, Meg James, published July 19, 2023. Available at <https://www.latimes.com/entertainment-arts/business/story/2023-07-19/rust-armorer-hannah-gutierrez-reed-prosecutors-charge-drug-test> New Mexico 1st Judicial District Judge Mary Marlowe Sommer has allowed Gutierrez Reed to keep a gun at her Arizona home. During the hearing, Morrissey asked the judge to revoke that condition. Morrissey said she has information that Gutierrez Reed has "suffered from a significant substance abuse problem" and asked for random drug testing of Gutierrez Reed.

¹⁷ 'RUST' ARMORER INSURANCE PAID OUT \$50K SETTLEMENT In Friend's Deadly Motorcycle Crash. TMZ. Published October 27, 2021. Available at <https://www.tMZ.com/2021/10/27/rust-armorer-hannah-reed-50k-settlement-friend-death-motorcycle-crash/>

the parties' ability to convene a fair jury pool, due to these extrajudicial statements. Included among incredibly damaging rumors and statements regarding Ms. Gutierrez Reed's alleged guilt has been a persistent rumor, started early on that there was target shooting on the Rust set.¹⁸ This rumor has since been proven to be completely false. Not one witness has come forward to substantiate it. Yet, the rumor persists on the internet and has been pervasive amongst the general public.¹⁹ The Court during the first motion hearing deferred, denying the motion at the hearing, but allowing counsel to re-raise these issues closer in time to the trial.

LAW AND ARGUMENT

Ninety years ago, in *Berger v. United States*, 295 U.S. 78, 88 (1935), the Supreme court pronounced that the government's interest in a criminal prosecution "is not that it shall win a case, but that Justice shall be done." It is the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction." *Id.* Both the federal and state constitutions guarantee the right to due process. *See* U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18; *see also State v. Brule*, 1999-NMSC-026, ¶ 8, 127 N.M. 368, 371, 981 P.2d 782, 785. Prosecutors have enormous discretion in deciding what crimes they will charge and who they will prosecute. When prosecutors abuse that discretion grave injustice occurs. Supreme Court Justice Robert Jackson gave a speech at the second annual conference of United States Attorneys on this subject. Defendant offers two excerpts from this speech:²⁰

¹⁸ 'Rust' Shooting: Gun That Killed Halyna Hutchins Was Used That Morning for Live-Ammo Target Practice. The Wrap. Sharon Waxman and Biran Welk. Published October 25, 2021 available at <https://www.thewrap.com/halyna-hutchins-live-ammo-target-practice/>

¹⁹ "'Rust' crew members reportedly used guns with live ammunition hours before deadly shooting on set. CNN. Originally aired October 26, 2021 available <https://www.youtube.com/watch?v=oy04-tmNJCE>

²⁰ "THE FEDERAL PROSECUTOR" An Address by Robert H. Jackson, Attorney General of the United States, Delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D.C., April 1, 1940 10:00 A.M. available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>

“It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice' or other base motives, he is one of the worst.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then

searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.”

Unfortunately the very type of injustice Justice Jackson described has occurred in this case. The special prosecutor selected Ms. Gutierrez-Reed and searched high and low for some crime she may have committed.²¹ The tampering count should be severed and dismissed.

LAW ON TAMPERING

In order to prove tampering with evidence beyond a reasonable doubt the special prosecutor must prove that the claimed substance is actually a controlled substance. UJI 14-2241. TAMPERING WITH EVIDENCE; ESSENTIAL ELEMENTS (element one requires that the physical evidence that was tampered with be specifically identified); see also *State v. Martinez*, No. A-1-CA-39941, 2023 WL 8599354, at *1 (N.M. Ct. App. Dec. 12, 2023)(Jury instruction for a tampering with evidence charge concerning methamphetamine required that jury find as part of element one that Defendant threw a package of methamphetamine into a toilet).

Here, the State’s only witness as to the tampering count cannot prove that the substance handed to her was some type of narcotic. The substance was never collected – despite the state witness’s claim that she walked past police officers with the substance in her hand. It was never tested. The witness also lacks foundation to identify the substance as cocaine, as many white

²¹ “Show me the man and I’ll show you the crime.” Lavrenty Beria, head of Stalin’s secret police.

powders resemble cocaine. This witness is now in her 50s and last saw *crack* cocaine – not powder cocaine - at age 20. The probative value therefore of the testimony is very low and the prejudicial impact is high. The State is essentially asking the jury to speculate about what the substance was and to guess based on the witness's guess that the substance was cocaine. The State will also then try to make the jury infer that Ms. Gutierrez Reed must have used the substance while on set during Rust production, even though there is absolutely no evidence of this. We know the special prosecutor will ask for this speculative leap – on top of prior speculation as to what this supposed substance was because they have already plainly stated their intention to make that argument:

“It is likely that Defendant Gutierrez was hungover when she inserted a live bullet into a gun that she knew was going to be used at some point by an actor while filming a shooting scene with other actors and crew members," Morrissey and Lewis claimed, adding, "The crime of involuntary manslaughter was designed specifically for this type of circumstance.”²²

In fact, other witnesses have stated that they never saw Hannah impaired on set or hung over. This add-on count exists merely to cause spillover prejudice onto Ms. Gutierrez Reed on the charged manslaughter counts.

LAW ON JOINDER

Rule 5-203 provides:

A. Joinder of offenses. Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

²² Prosecutors Allege 'Rust' Armorer Was Hungover, Resulting in Live Rounds Being Loaded in Gun. People Magazine. Tommy McArdle, *supra* note 16.

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

C. Motion for severance. If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants by the filing of a statement of joinder for trial, the court may order separate trials of offenses, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection in camera any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

N.M. R. Crim. P. Dist. Ct. 5-203.

Joinder of the involuntary manslaughter and tampering charges is not proper here and the tampering charge should be severed. The tampering charge is “not of the same or similar character” as the involuntary manslaughter charge making joinder pursuant to Rule 5-203(A)(1) inappropriate. They are also not based on the same conduct or of a series of acts connected together and do not constitute a single scheme or plan making joinder under Rule 5-203(A)(2) inappropriate. NMRA 5-203 exists to protect criminal defendants from piecemeal prosecution of acts which occur in a single transaction or occurrence – not for the State to use as a cudgel to bring unrelated cases for a Defendant in front of the same jury. *See State v. Jackson*, 2020-NMCA-034, 1 23, 468 P.3d 901, 912, (Rule 5-203(A) is intended to protect Defendant from dealing with multiple cases or successive prosecution of charges arising from a single criminal episode). The joinder of these disparate charges for Ms. Gutierrez Reed violates both the letter and spirit of Rule 5-203.

LAW ON SEVERANCE AND CROSS ADMISSIBILITY OF 11-404B EVIDENCE; 11-401
and 11-403 ADMISSIBILITY

The State is trying to use the tampering charges as improper other bad acts evidence to taint the jury with unrelated allegations of narcotics use and on the job impairment, which as noted above, are not based on lawful competent evidence. The fact that not a single law enforcement

officer noted any concern or suspicion that Ms. Gutierrez Reed was under the influence of any controlled substance when they were interacting with her is telling. Law enforcement officers are trained to notice when suspects or witnesses they are interacting with may be under the influence of drugs. It is a critical investigatory function in determining whether a witness contains sufficient capacity to observe and accurately relay events they may have observed. Law enforcement officers also need to be keenly aware of whether someone is intoxicated when they ask them to them to waive any rights – including their Miranda rights of which they are advised prior to being interviewed. Law enforcement officers need to be keenly aware of this specifically because in New Mexico an impaired person cannot make a knowing and intelligent waiver of their right to not participate in a custodial interrogation. *State v. Young*, 1994-NMCA-061, ¶ 14, 117 N.M. 688, 692, 875 P.2d 1119, 1123 (Holding that trial court’s must consider a Defendant’s intoxication in determining whether a Defendant knowingly and intelligently waived his right to not participate in a custodial interrogation). Ms. Gutierrez was advised of her Miranda rights by SFSO deputies – so they would have actually been on the lookout for signs of impairment – none were observed or noted. Furthermore, in the pre-trial interviews of witnesses who worked closely with Ms. Gutierrez Reed on set, Nicole Montoya and Sarah Zachary specifically, both witnesses stated that they saw no signs of Ms. Gutierrez Reed engaging in on set drug use or being impaired on set.

The government has not pointed to any specific fact to suggest that Ms. Gutierrez Reed was in fact experiencing a “hangover” from cocaine use on the date of incident. They cannot do this because no such facts exist. The evidence on the state’s “hangover theory” does not meet the test for relevance because it does not have a tendency to make a fact more or less probable than it would be without the evidence. NMRA 11-401(A). The “hangover theory” is also not a fact of consequence in determining either the involuntary manslaughter charge or the tampering with

evidence charge. The state's speculation that Ms. Gutierrez Reed may have possessed cocaine and supposedly concealed that cocaine likewise has no relevance under NMRA 11-401 in the jury deciding any aspect of the involuntary manslaughter count.

In applying NMRA 11-403 courts must engage in a balancing of interests – specifically weighing the probative value of relevant evidence against the risk of unfair prejudice. "For purposes of Rule 11-403, the term unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Evidence is unfairly prejudicial if it is best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason. *State v. Martinez*, 2021-NMSC-002, ¶ 101, 478 P.3d 880, 910 (internal citations and quotations omitted). This is exactly the kind of reaction that the speculative argument is designed to produce with the jury – outrage that someone would perform a job concerning the safety of others while impaired or hungover. The typical juror in Santa Fe County would also tend to be prejudiced against recreational users of cocaine as it is extremely atypical behavior that would serve to alienate a defendant from jurors. The balancing of interests clearly points to exclusion – there is zero probative value and substantial risk of prejudice.

Ms. Gutierrez Reed would be profoundly prejudiced by a jury hearing and considering both the involuntary manslaughter and tampering counts at the same time. The jury would be more likely to convict on one or both counts because they will have been exposed to a propensity argument. Propensity arguments are expressly prohibited by NMRA 11-404(A)(1). The improper admission into evidence of other crimes a defendant is alleged to have committed is reversible error. *Casaus v. State*, 1980-NMSC-017, ¶ 5, 94 N.M. 58, 59, 607 P.2d 596, 597

Even when counts may be properly joined under NMRA 5-203 the criminal acts must be cross admissible in separate trials to avoid causing unfair prejudice to a defendant. *State v. Flores*, 2015-NMCA-002, ¶ 24, 340 P.3d 622, 628 (“In determining whether a district court's failure to sever resulted in prejudice to the defendant, we must first determine whether the evidence pertaining to each charge would be cross-admissible in separate trials. *Id.* ¶ 19 (“[T]here is a high risk of undue prejudice whenever joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.”). Whether evidence is cross-admissible is determinized through an 11-404(B) analysis of the evidence. *Id.* ¶ 25.

In *State v. Gallegos* a trial court declined to sever two separate larceny counts that were remote in time place and occurrence from one another; on appeal the trial court was reversed and the charges remanded for separate trials. *State v. Gallegos*, 1989-NMCA-066, ¶ 37-38, 109 N.M. 55, 64, 781 P.2d 783, 792. The Court of appeals in this case made a specific finding of particular importance to the two cases before the Court “We deem it noteworthy that the state does not advance any arguments to support the admissibility of evidence of entirely distinct crimes in separate trials of the charges against this defendant.” *Id.* ¶ 37.

In the instant case the government has advanced flawed and prejudicial reasoning as to why the corpus of evidence for tampering with evidence count could be admissible in the involuntary manslaughter case. The special prosecutor has never stated how evidence of the involuntary manslaughter charge would be admissible in a separate case for the tampering with evidence count. There is no conceivable argument that the involuntary manslaughter allegation and evidence would be admissible in a separate trial for tampering with evidence. For that reason alone, independent of any other reason, the charges must be severed. *Flores*, 2015-NMCA-002, ¶ 24

(evidence pertaining to each charge must be cross-admissible in separate trials to deny Defendant's motion to sever).

The government is engaged in the impermissible use of other acts evidence, speculative other acts evidence at that, to suggest to the jury that Ms. Gutierrez Reed committed both crimes she is charged with. The government bears the burden of specifically articulating some permissible use of the other acts evidence. NMRA 11-404(B)(1) and (2); see also *State v. Martinez*, 2021-NMSC-002, ¶ 94, 478 P.3d 880, 908 (“The initial threshold for admissibility of prior uncharged conduct is whether it is probative on any essential element of the charged crime... [T]he proponent of the evidence is required to identify and articulate the consequential fact to which the evidence is directed before it is admitted.”)(internal citations and quotations omitted).

This motion has discussed at length that there is no probative use in admitting the alleged facts that form the basis of the tampering charge in the involuntary manslaughter case. The government is obligated to come forward and provide reasons as to why the tampering with evidence allegations would be probative on any essential element of the involuntary manslaughter charge. The government must also identify a permitted use under NMRA 11-404(B)(2) such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Id.* at ¶ 94; NMRA 11-404(B)(2). There is no conceivable permitted use for the tampering allegations as evidence in the state trying to prove the involuntary manslaughter charge.

Due to the cross-admissibility of evidence requirement the government must also prove that the involuntary manslaughter allegations would have a permitted use in proving the tampering with evidence charge. *Martinez*, 2021-NMSC-002, ¶ 94. The government would also need to identify some way that the involuntary manslaughter allegations would be probative on any essential element of the tampering charge. *Id.* This obviously cannot be done.

In sum, for all these reasons, the newly filed tampering charges should be severed from the involuntary manslaughter charge. The government should also be precluded from utilizing the allegations in the tampering with evidence charge as evidence in the prosecution of the involuntary manslaughter charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent through the ESF system, which caused the following parties to be served by electronic means, as reflected on the Notice of Electronic Filing this 16th day of January, 2024, to the counsel listed below:

Kari Morrisey
Jason Lewis
Special Prosecutors
1st Judicial District Attorney's Office

/s/ Jason Bowles

Jason Bowles
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